80-838

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

ELIZABETH EVANS, ALENA M. STEVENSON AND
JAYNE C. EDDENS, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS,

VERSUS

CENTRAL PIEDMONT COMMUNITY COLLEGE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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November 20, 1980

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the trial court and holding that, as a matter of law, an employer's burden in a class action pattern and practice discrimination case is discharged by one unsubstantiated statement of a lay witness.

2. Whether the Court of Appeals erred in reversing the trial court and holding that, as a matter of law, in order to prove disparate treatment, the plaintiff must show that a specific member of the unprotected group received more favorable treatment.

3. Whether the Court of Appeals erred in reversing the trial court and holding that respondent either articulated a legitimate non-discriminatory reason or that pretext was not shown.

4. Whether the Court of Appeals erred in reviewing and overruling the subsidiary findings of the trial court without applying the "clearly erroneous" rule.

5. Whether the Court of Appeals was correct in overruling the trial court's ultimate finding of discrimination by conducting an independent review of the evidence and selecting the defendant's evidence to decide the factual questions anew (i.e. substituting

its judgment as to both the subsidiary and ultimate findings of the District Court)...

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. See 626 F.2d. 860 (1980). The opinion along with the Order overruling Petitioners' Petition for Rehearing and the Judgment of the District Court are attached as Appendices hereto. Also attached is the decision of the District Court (reported in 475 F. Supp. 114) which was appealed by the Respondent to the Court of Appeals.

JURISDICTION

The opinion of the Court of Appeals was entered on July 15, 1980. A timely petition for rehearing was denied on August 28, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are 42 U.S.C. §2000e et seq. and Federal Rules of Civil Procedure Rule 52(a), 28 U.S.C.

STATEMENT OF THE CASE

Petitioners Evans, Stevenson, and Eddens, the named plaintiffs in a class action alleging sex discrimination in employment, proved that they were classified and paid as clerical workers, although each held a position which required the performance of supervisory and managerial duties. The petitioners proved a system-wide classification scheme which resulted in both less favorable treatment for women and having an adverse impact upon women.

The two class members involved in this appeal alleged and proved discrimination in the areas of job classification and pay on the basis of sex.

This trial court's jurisdiction was invoked pursuant to 42 U.S.C. §2000e-5(f)(1) and §2000e-5(f)(3).

A. Petitioner Elizabeth Evans was hired by Respondent (hereinafter CPCC) in 1968. She assumed all

admissions office duties in 1969. Evans was listed in various publications, including internal CPCC publications as "Admissions Officer of CPCC". Evans' duties included, but were not limited to, supervising up to 12 employees, interviewing prospective employees, making hiring and termination recommendations, and arranging work schedules. Evans also appeared at various local high schools as CPCC's Admissions Officer. Evans was always classified and paid as a "clerical" worker. From 1973 to 1976, Evans repeatedly requested that her classification and pay be upgraded. Her requests were denied. Evans filed a timely EEOC charge. In March of 1976 CPCC received notice from the EEOC of Evans' charge. In April of 1976, Evans was notified of changes in her job duties. Effective May 1, 1976, Evans no longer supervised employees. Evans was deemed a "process manager" by CPCC. Hence, she was classified and paid at the clerical level.

B. Petitioner Alena Stevenson was hired by CPCC in 1972. In May of 1973 she was titled "Assistant Director" in the Student Aid Office. At that time Stevenson's "inherent" job duties included supervision of employees and discretionary authority in making financial aid awards. She was classified and paid as a

"clerical" worker. In October, 1973, she was recommended for a pay raise because she had discretionary, managerial and supervisory authority in her job duties. Beginning in July of 1974, after a male was hired as Director of Financial Aid, and continuing for over two years, Stevenson attempted to have her job upgraded from a clerical classification, or in the alternative, to have her supervisory/managerial duties reassigned. Her requests were denied. Stevenson was deemed a "process manager" by CPCC and remained in the clerical classification. Her job descriptions always contained supervisory, managerial and discretionary duties of varying degrees. In January, 1976, Stevenson applied for the vacant Director of Financial Aid and was denied this job because of her sex.

C. Petitioner Jayne Eddens, a college graduate, was hired by CPCC in 1975. In 1976, Eddens was promoted to "clerical 3" of the Registration Center. This "clerical 3" position was titled "supervisor of the Registration Center" when it had been held by a male who was paid at a supervisory level. When Eddens' immediate predecessor in the job, a female, assumed the position, the job and pay became "paraprofessional". The duties of the position did not change with the

personnel changes. Eddens' duties included supervising, hiring, and terminating employees, and carrying out 4 registrations each year. Eddens was classified and paid as a "clerical" worker. She was deemed a "process manager" by CPCC. Eddens was promised increased pay when she assumed the "clerical 3" position on June 1, 1976. She did not received the promised increase until February, 1977, after she filed an EEOC charge.

D. Petitioners Sylvia Guion and Margaret Laing, two class members, also presented evidence at the bench trial. Guion was performing all the duties of an instructor, but was classified and paid as a "clerical". Guion's specific request for instructor level pay was denied. Guion was the co-ordinator of the telecourse center. Laing was hired as a part-time script developer. After she was told there were no full-time positions available, a male was hired as her full-time assistant. Beginning in the fall of 1975, Laing was paid $4.32 an hour as a script developer. In the summer of 1976, a male was hired as a part-time script developer. He was paid $7.00 per hour. There was no difference in the jobs Ms. Laing and the male performed. When this pay discrepancy was brought to CPCC's attention, Laing's pay was raised to $4.88 an

hour. The male continued to earn $7.00 per hour until he left CPCC in 1977. In April, 1978, Laing sought a full time position as a script writer. Her script was rated the best of those submitted by applicants. She was not hired. A vacancy existed because CPCC was making part time positions full time.

E. Process Management. Petitioners also introduced detailed statistical proof establishing that:

1. The clerical category of CPCC's workforce was 96.9%-100% female annually between 1973 and 1977, and 95.2% of the post-Act clerical hires were female.

2. The overwhelming majority of all females employed by CPCC, including post-Act hires, are classified in the clerical category.

3. The majority of male employees, including post-Act hires, are classified and/or hired as officials/managers and administrators. The officials/managers classification is the highest pay category.

4. Females represented 30% of the School Administrators in the 1970 Charlotte SMSA while representing 11 to 19% of CPCC's administrators.

5. 88% of non-academic males are above the overall salary median for non-academic employees, while

75% of non-academic females are below the overall median.

6. 93% of non-academic, non-administrative males are above the overall salary median for non-academic, non-administrative employees while 64% of the females in this classification are below the overall median.

7. 54% of administrative males are above the overall salary median of administrative employees while 72% of administrative females are below the overall median.

Respondent's defense to process management consisted of:

1. A denial that the petitioners performed the duties they testified to performing or, in the alternative, they worked beyond their job descriptions in performing these duties.[1]

Process management, according to CPCC, is a term used to differentiate from "supervision". Process

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[1] This is somewhat of a "Catch 22" defense, since the petitioners either did not have job descriptions, or were involved in writing job descriptions during the time period in question.

managers are not classified as supervisors. The "process manager" is in charge of a product or the development of a process. A "process manager" is responsible for "instructing those persons that he is working with how to do it, what kind of product they should expect to produce and even evaluate the product." A "process manager" is not "responsible for hiring, recommendations on firing, recommendations for discipline, recommendations for salary matters." If a "process manager" had these duties, that person would be a supervisor. Process management was described by CPCC's president as follows:

> ...that there are certain duties that are, that have to be accomplished in an area, and the supervisor of the area needs information as to how those duties are progressing, and so someone is designated as the individual to say these are the things that are done, and they can move on to something else. This is the supervision of a process.

CPCC's president also testified that a "supervisor" or "administrator" (paid at a supervisory level) has the duties of: assigning work to employees; making sure that they do the work; defining employees' jobs; recommending that certain persons be hired; and interviewing job applicants. According to CPCC's defense,

the petitioners were not entitled to supervisory level pay or position classification.

The "process manager" is classified as clerical. A particular example is that of Ms. Jo Wade. Wade was classified as a "clerical" employee. She was considered to be a "process manager" instead of a "supervisor". She received the job title of "Area Manager" and had supervisory responsibility for over 20 persons. Wade's male supervisor stated that he could not see any difference between supervising the work process and supervising the people.

There are numerous other examples. In fact, the evidence established that Evans, Stevenson, and Eddens, classified and paid as clerical employees, performed those duties listed by CPCC as entitling the employee to supervisory level pay and position classification. But the petitioners were denied the higher pay and position on the ground they were mere "process managers" rather than supervisors.

The evidence established, and the trial court concluded, that "process management" in practice was applied to women who were placed in supervisory positions but who were classified and paid as clerical employees.

Process management operated to exclude women from the higher paying supervisory/administrative positions.

F. Findings of the District Court. After the filing of the complaint by Evans, the intervention of Stevenson and Eddens, the District Court conditionally certified a class pursuant to FRCP Rule 23. After the trial on the merits, the District Court found that:

1. Petitioners Evans, Eddens and Stevenson had supervisory duties, and each had been discriminated against on account of her sex in that they had been denied pay and job classifications commensurate with their responsibilities;

2. Petitioners Guion and Laing had been discriminated against on account of their sex in job classification and pay;

3. A final class was proper;

4. CPCC had discriminated against the class through its policy of "process management" which in theory says that people can supervise the work product of other employees, without excercising supervision over the employees who actually do the work. In practice, CPCC had placed women with clerical titles in jobs where they were required to perform those

duties listed by CPCC as "supervisory", the performance of which, according to CPCC, entitled the employee to supervisory level pay;

5. CPCC's policy of "process management" is a pattern and practice of discrimination against women which violated their rights under Title VII.

G. Holding of the Appellate Court. The Court of Appeals reversed the District Court on all counts.[2] The Court's unpublished opinion neither mentioned nor applied the "clearly erroneous" standard of review. The Court of Appeals never discussed the findings of fact made by the trial court. The appellate court conducted an independent review of the record, isolated items from the respondent's evidence as dispositive of the issues, without discussing the plaintiff's evidence at all (e.g., "the defendant's evidence suggests that [Eddens'] raise was delayed for six months because the department in which Eddens worked was in the process of reorganization"). The plaintiffs' evidence on this disputed point, and the trial court's finding on

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[2] The Court of Appeals failed to either mention or discuss the District Court's conclusion that CPCC retaliated against petitioner Evans for filing an EEOC charge.

this point, were ignored (never discussed) by the Court of Appeals. For all practical purposes, the Court of Appeals conducted a trial de novo. One entire theory of the case (process management's disparate impact on women) was denied existence by the Court of Appeals, particularly in reference to the individual claims of the petitioners. The Court of Appeals viewed the petitioners' individual claims as limited to disparate treatment. The Court of Appeals held that the disparate treatment case failed because there was no evidence of specific males who held positions similar to those held by the petitioners (an extremely difficult feat to achieve, given that only 2-3 males were classified in the clerical category).

Furthermore, the Court of Appeals' language, and citation, refer to Rule 23(b)(3) of the Federal Rules of Civil Procedure. Employment discrimination cases are generally 23(b)(2) cases. The trial court in this case conditionally certified the class under FRCP 23(b)(2) for injunctive purposes, and 23(b)(3) for reinstatement and backpay purposes. A bifurcated trial was ordered. Thus, any problems as to factual differences would be eliminated since liability would be presumed, and each claimant would be presenting her

claim separately.

REASONS FOR GRANTING THE WRIT

The trial court made an express finding that prima facie cases of individual discrimination were shown. The trial court ruled that CPCC failed to meet its burden, and denied implicitly, if said burden was met, pretext was shown. Finally, the trial court concluded that a pattern and practice of discrimination against women was proved. Respondent's burden under the disparate treatment theory of the case was to "articulate a legitimate non-discriminatory reason" for its conduct. The respondent's burden under the disparate impact theory of the case was to show either that: the petitioners' evidence was incorrect; or, to claim the challenged practice was a business necessity. Respondent failed to show a business necessity. The Court of Appeals made a new finding of fact that more men than women were affected by process management. It then concluded that the practice did not have a disparate impact on women. The only evidence relied upon by the Court of Appeals (and the only evidence advanced by the respondent), on the issue of those affected by "process management", was one

statement by a CPCC vice-president who thought (although he had not made an actual count) that more men than women were in process management positions. The respondent did not offer the testimony from or about any male who had been or was then a "process manager". The Court of Appeals did not apply the "clearly erroneous" rule to the trial court's finding that women in clerical positions were the employees affected by process management. Petitioners suggest that the Court of Appeals chose to ignore the clearly erroneous rule because there was, in fact, substantial evidence to support the trial court's finding. The Court of Appeals erred in two ways with this particular holding. It did not apply the "clearly erroneous" doctrine, and it held that a prima facie case of class discrimination (pattern and practice) can be rebutted by the single unsubstantiated statement or "thought" of a lay witness. This ruling of the Court of Appeals is in direct conflict with decisions of this Court, including Zenith Radio Corporation v Hazeltine Research, Inc., 359 U.S. 100 (1969) and International Brotherhood of Teamsters v United States, 431 U.S. 324 (1977).

The Court of Appeals never applied the "clearly erroneous" standard mandated by Rule 52(a) of the

Federal Rules of Civil Procedure. The appellate court either ignored the findings of the trial court or substituted its own version of the evidence to make new findings. Examples of this include, but are not limited to:

a. The appellate court stated that the duties of petitioner Evans were "entirely clerical". The record evidence shows, and the District Court found, that Evans had supervisory duties.

b. The appellate court found that Evans did not supervise the part-time workers and work study students because the person "directly responsible for those persons was Evans' immediate superior". This ignores the finding of the trial court supported by the evidence that Evans was directly responsible for said persons.

c. The appellate court, in reversing the trial court, never discussed the retaliation claim of petitoner Evans.

d. The appellate court ignored the evidence concerning the job duties of petitioner Stevenson involving discretionary, managerial and supervisory job duties.

e. The appellate court limited Stevenson's claim to the vacancy for Director of Financial Aid in 1976, when it is clear that the trial court with supporting evidence found that Stevenson had been improperly paid and classified prior to 1976.

f. The appellate court found that the respondent's evidence suggested that Eddens' pay increase was delayed due to departmental reorganization. The evidence shows that Ms. Eddens was not given a pay increase until after she filed an EEOC charge.

These actions and rulings of the Court of Appeals are in direct conflict with decisions of this Court, including Zenith Radio Corporation v Hazeltine Research, Inc., supra, wherein it was held that the questions before the appellate court is not whether it would have made the trial court's findings, "but on whether on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed" (citations omitted) and International Brotherhood of Teamsters v United States, supra.

The appellate court held that CPCC articulated a legitimate non-discriminatory reason and that pretext was not shown. There is conflict in the Circuits as to what level of proof constitutes "articulation

of a legitimate non-discriminatory reason" and pretext, under Furnco Construction Company v Waters, 438 U.S. 567 (1978) and Board of Trustees v Sweeney, 439 U.S. 24 (1978). (Cf. Texas Department of Community Affairs v Burdine, 608 F.2d. 563 (5th Cir., 1979), cert. granted ____U.S.____, 100 S.Ct. 3009 (1980), and Ambush v Montgomery County Department of Finance, 620 F.2d. 1048 (4th Cir., 1980).)

The Court of Appeals' holding that the petitioners failed to prove their individual cases of disparate treatment, on the basis that there was no showing of a similarly situated male receiving more favorable treatment, conflicts with this Court's decisions in Teamsters, supra, Furnco, supra and McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973).

This Court should grant the Petition for Writ of Certiorari for the reasons that: a question presently in conflict between the Circuits is raised by this case; an important question involving proof in Title VII cases is raised; and the Court of Appeals' decision conflicted with decisions of this Court.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted, this 20 day of November, 1980.

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CERTIFICATE OF SERVICE

I, Michael A. Sheely, attorney for Petitioners, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit have been served upon the attorney for Respondent by placing same in the United States mail, certified, return receipt requested, addressed to William Auten, 3450 NCNB Plaza, Charlotte, N. C. 28280 on this the ____ day of November, 1980.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-76-169
ELIZABETH EVANS, individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE; RICHARD HAGEMEYER, individually and as President of Central Piedmont Community College; and MELVIN GAY, individually and as Vice President of Student Services of Central Piedmont Community College,

Defendants.

C-C-76-327
JOYCE Y. MASSEY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

These cases were tried without a jury beginning February 20, 1979. The court heard the evidence and argument of counsel, and examined and considered the exhibits tendered by the parties, and now makes the

following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On May 28, 1976, plaintiff Elizabeth Evans, individually and on behalf of others similarly situated, filed an action (C-C-76-169) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (hereafter sometimes referred to as "the Act"), seeking relief for alleged violations of §704 of the Act, 42 U.S.C. §2000e-3(a).

2. Upon motion of plaintiff Evans, Alena M. Stevenson and Jayne C. Eddens were added as named plaintiffs by order of this court dated November 29, 1976.

3. On November 26, 1976, Joyce Y. Massey, individually and on behalf of others similarly situated, filed a suit against Central Piedmont Community College (C-C-76-327), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Upon the motion of defendants, the two cases, C-C-76-169 and C-C-76-327, were consolidated for trial by order of this court dated February 17, 1977.

Plaintiff Massey sought to maintain her case as a class action and represent a class consisting of "qualified blacks who have been or may be subjected to discrimination by Defendant in the exercise of its

employment practices based on race." At a hearing on June 22, 1978, plaintiff Massey acknowledged that she could not satisfy the requisites for maintenance of a class action. Her request for certification of a class was denied by order of this court on July 18, 1978, without prejudice to the rights of potential class members alleged in the complaint.

5. The court entered an order on July 19, 1978, conditionally certifying a class consisting of "all qualified women who have held or have applied for non-academic jobs at Central Piedmont Community College since August 13, 1975, and who have been or may be subjected to discrimination by defendants on account of sex." A notice to class members, approved by the court, was mailed to known class members and published in a local newspaper.

6. Defendant Central Piedmont Community College (CPCC) is an educational institution operating pursuant to Chapter 115A of the General Statutes of North Carolina. CPCC has its principal offices in Charlotte, and is an employer within the meaning of Title VII.

7. Defendant Richard Hagemeyer is President of CPCC, and defendant Melvin Gay is Vice President of

Student Services. Plaintiffs have not made a showing which would subject these defendants to individual liability. Therefore the claims against them will be dismissed.

THE NAMED PLAINTIFFS

8. The named plaintiffs have complied with the administrative requirement of Title VII.

9. Plaintiff Elizabeth Evans is a black woman, and a resident of Charlotte, North Carolina. She has been in charge of the Admissions Office at CPCC since 1969, supervising the work of up to twelve part time or work study students. Evans was classified and paid as a clerical employee. The work in the Admissions Office is primarily clerical--starting files for entering students, filing test scores and other student records, scheduling placement tests, and some limited counseling of students. In the course of supervising the employees in the Admissions Office, Evans set their work hours, assigned duties, interviewed applicants, and made recommendations for hiring, transfer, discharge and discipline of her employees.

10. Plaintiff Evans represented CPCC at various workshops and seminars around the state, and at local

high schools. At various times Evans was referred to as "Admissions Officer" with the knowledge and consent of college officials.

11. Plaintiff Evans filed a charge with the Equal Employment Opportunity Commission (EEOC) on February 10, 1976, alleging that CPCC failed to promote her or pay her commensurate with her responsibilities because of her race and sex. Within a few weeks thereafter, Evans' job was essentially taken away. Her pay remained the same, but the work her office had previously done was shifted to another group of people. The Admissions Office worked closely with the counselors at CPCC. When the head of counseling proposed that the work be shifted back to Evans, Dr. Gay, who was responsible for the shift, refused, saying that the matter should be held up pending the outcome of Evans' suit against them. These actions by CPCC, shifting Evans' work to another area, were in retaliation for her filing a charge with the EEOC.

12. The defendant CPCC discriminated against Evans, on the basis of her sex, by not promoting her or paying her commensurate with her responsibilities in the Admissions Office, and by taking her job away

in retaliation for filing a charge with the EEOC.

13. Plaintiff Alena Stevenson is a white woman. She worked at CPCC as an executive secretary beginning in 1972. In 1973, she was named Financial Aids Officer. The job title was later changed to Assistant Director, Student Financial Aid Office. While holding both jobs in the financial aid office, Stevenson was classified as a clerical employee, but performed duties which were discretionary, managerial and supervisory.

14. In 1974, Mrs. Stevenson refused to assume the title of Director of Financial Aid because she did not believe that she would be paid a salary commensurate with the job responsibilities. Mrs. Stevenson's beliefs were well founded. While classified as a clerical employee, she continually requested that her administrative and managerial responsibilities be removed from her job description, or that her job classification and salary be upgraded to an administrative position. At that time she preferred to remain a clerical employee. Although some minor changes were made in her job, CPCC refused her request for a salary or title change. In 1975, Mrs. Stevenson decided

to apply for the then vacant job of Director of Financial Aid. CPCC hired a man from outside the school, contrary to a policy of promotion from within.

15. The defendant CPCC discriminated against plaintiff Alena Stevenson on the basis of her sex by not promoting her or paying her a salary commensurate with her job responsibilities.

16. Plaintiff Jayne Eddens is a white woman. She worked at CPCC in 1976 in the Registration Center as a clerical employee. Eddens was in charge of the Registration Center with supervisory responsibilities over numerous other employees. The job held by Eddens was essentially the same as that held by a man a few years earlier, although there were some changes made. The man had been paid a salary of an administrative employee. A woman who held the job in the interim between the man and Eddens was also paid the salary of an administrative employee after she protested. Before Eddens assumed the job, the title was changed and the pay lowered. The duties remained essentially unchanged.

17. The defendant CPCC discriminated against plaintiff Eddens on the basis of her sex by failing to

pay her a salary commensurate with her job responsibilities.

18. Plaintiff Joyce Massey is a black woman. She worked part time at CPCC during 1973 and 1974. After working for another employer for a short time, Massey applied for another job at CPCC in December, 1974, but was not rehired. Massey contends that the decision not to rehire her was based on her race.

19. The court finds that the decision not to rehire Massey was not discriminatory on the basis of her race or her sex, but was justified by her prior work record with the college. The defendant's motion for directed verdict on Massey's case should be allowed.

CLASS MEMBERS WHO PRESENTED EVIDENCE AT THE TRIAL

20. Margaret Laing is a white woman. She started working at CPCC in 1970 as a secretary. In 1973 she became a part time employee in the communications department as a script developer. While holding this job she had two different male assistants who were full time employees. Full time employees are entitled to fringe benefits worth up to 20% of the employee's salary. On several occasions Laing sought full time status, but was refused each time.

21. In 1975, Laing became a script writer in the same department, earning $4.32 per hour. A man, Tom Wolpert, was hired later in the same job at $7.00 per hour. Laing sought equal pay with Wolpert, but was refused.

22. The defendant CPCC discriminated against Laing on the basis of her sex by failing to grant her full time employee status and failing to pay her the same as the defendant paid men doing the same work.

23. Sylvia (Sunny) Guion is a white woman. She was employed as CPCC as a receptionist in the Communications Center in July, 1976 at $418.00 per month. In January, 1977, she was promoted to Lab Assistant II, but kept her receptionist responsibilities. Guion supervised the Telecourse Center, which offered instructions to students through videotaped lessons. Students enrolled in reading, mathematics, and English courses. While a faculty member was listed as the course teacher, Guion was the instructor for the course. She was the teacher for all practical purposes. In addition to tutoring students, Guion filled out forms required by the State of North Carolina and, with the knowledge and consent of college officials, signed them as instructor for the courses.

24. Guion performed the duties of an instructor, but was paid the salary of a lab assistant. The defendant CPCC discriminated against Guion on the basis of her sex by failing to grant her the status of instructor with commensurate salary and benefits.

25. Class members Myra Dockery, Sally Young and Joanne Brown testified at the trial. The evidence presented at trial would not support a finding of discrimination against them. These class members who testified, along with other class members, may present their claims of discrimination before the special master to be appointed. See Sledge vs. J. P. Stevens & Co., Inc, 585 F.2d 625 (4th Cir, 1978).

THE CLASS

26. The court finds a final class that consists of females in non-academic employment who were denied promotion or advancement or other perquisites of employment on the basis of their sex beginning August 13, 1975.

27. The defendant CPCC has discriminated against the class through its policy of "process management", which in theory says that people can supervise the work product of other employees, without exercising super-

vision over the employees who actually do the work. In practice, defendant has placed women with clerical titles in jobs where they are required to supervise clerical employees (some full time, others part time or work study students), and be responsible for the work product. These "clerical" employees make recommendations for hiring, transfer, promotions, and discipline of the employees in their departments, as well as exercise their judgment to train employees and direct their work activities.

28. The court finds that the defendant's policy of "process management" is a pattern and practice of discrimination against women which has violated their rights under Title VII.

29. The court will appoint a special master to hear the back pay claims of the named plaintiffs and class members Margaret Laing and Sylvia Guion, as well as the claims of other class members, consistent with a separate order to be entered appointing the special master.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action under §§706(f)(1) and 706(f)(3) of the Act, 42 U.S.C. §§2000e-5(f)(1) and 2000e-5(f)(3). This action is

properly before the court under §706(f)(3) of the Act, 42 U.S.C. §2000e-5(f)(3). All procedural requirements of §706(f)(1) of the Act have been met, 42 U.S.C. §2000e-5(f)(1).

2. Defendant CPCC is a proper defendant within the meaning of the Act, 42 U.S.C. §2000e. The plaintiffs have not shown that defendants Richard Hagemeyer and Melvin Gay are proper defendants, nor has a showing been made that would subject them to individual liability. Therefore, the case against them will be dismissed.

3. The court finds a final class should be certified that consists of females in non-academic employment who were denied promotion or advancement or other perquisites of employment on the basis of their sex beginning August 13, 1976.

4. The court finds as a matter of law that defendant has discriminated against the class through its policy of "process management" which in theory says that people can supervise the work product of other employees, without exercising supervision over the employees who actually do the work. In practice, the defendant has placed women with clerical titles in jobs where they are required to supervise clerical em-

ployees (some full time, others part time or work study students), and be responsible for the work product. These "clerical" employees make recommendations for hiring, transfer, promotion and discipline of the employees in their departments, as well as exercise their judgment to train employees and direct their work activities.

5. The court finds, as a matter of law, that the defendant's policy of "process management" is a pattern and practice of discrimination against women which has violated their rights under Title VII.

6. The court should appoint a special master to hear the back pay claims of the named plaintiffs and class members Margaret Laing and Sylvia Guion, as well as the discrimination claims of other class members, consistent with a separate order to be entered appointing the master.

7. Class members Myra Dockery, Sally Young, and Joanne Brown presented evidence at trial which would not support a finding of discrimination against them. These class members who testified, along with other class members, may present their claims of discrimination before the special master to be appointed. See

Sledge vs. J. P. Stevens & Co., Inc., 585 F.2d 625 (4th Cir, 1978).

8. Plaintiff proved a prima facie case of discrimination against the class, and Elizabeth Evans, Alena Stevenson, Jayne Eddens, Margaret Laing, and Sylvia Guion. The defendant CPCC discriminated against them on the basis of their sex by refusing to promote them or pay them commensurate with their respective job responsibilities. McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1972).

9. Once plaintiffs established a prima facie case, the burden shifted to defendant to articulate some legitimate reason for its actions. Defendant CPCC has not met this burden. McDonnell Douglas Corp. vs. Green, supra; Trustees of Keene State College vs. Sweeney, 439 U.S. _____(1978). Plaintiffs are entitled to be made whole under §706(g) of the Act, 42 U.S.C. §2000e-5(g). Albemarle Paper Co. vs. Moody, 422 U.S. 405 (1975).

10. The evidence amply demonstrates a sustained pattern and practice of discrimination against women in clerical positions at CPCC. International Brotherhood of Teamsters vs. United States, 341 U.S. 324 (1977). Therefore the defendant will be permanently enjoined

under §706(g) of the Act from further discrimination against women. 42 U.S.C. §2000e-5(g).

11. The court finds, as a matter of law, that the defendant's decision not to rehire plaintiff Joyce Massey was not discriminatory on the basis of her race or sex, but was justified by her prior work record with the college. The defendant's motion for a directed verdict on Massey's case should be allowed.

12. Plaintiffs in C-C-76-169 are entitled to costs and reasonable attorney's fees.

ORDER

IT IS THEREFORE ORDERED:

1. That C-C-76-169 be maintained as a class action, and that a final class be and it is certified consisting of females in non-academic employment who were denied promotion or advancement or other perquisites of employment on the basis of their sex beginning August 13, 1976.

2. That the defendants' motion to dismiss the complaint against defendants Hagemeyer and Gay be, and it is hereby, allowed.

3. That the defendant CPCC's motion for directed verdict in the case of Joyce Massey (C-C-76-327) be, and it hereby is, allowed.

4. That defendant CPCC, its agents, successors, employees, attorneys and those acting in concert with them and at their direction, are hereby permanently enjoined from continuing or maintaining their discriminatory practice of "process management" which, in effect, hires women in clerical job titles, but places administrative and managerial responsibilities on them.

5. That the parties meet to seek agreement on a special master to be appointed by the court, and seek agreement on the text of a proposed order of appointment. The parties shall report their progress to the court within thirty (30) days of the filing date of this order. The report should indicate what the parties have agreed on, and what remains to be decided by the court.

This 17th day of August, 1979.

/s/James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1618

UNPUBLISHED

Elizabeth Evans, Alena M. Stevenson and Jayne C. Eddens, individually and on behalf of all others similarly situated,

Appellees,

versus

Central Piedmont Community College,

Appellant,

and

Richard Hagemeyer, individually and as President of Central Piedmont Community College; and Melvin Gay, individually and as Vice President of Student Services of Central Piedmont Community College,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued June 3, 1980 Decided July 15, 1980

Before HAYNSWORTH, Chief Judge, WIDENER, Circuit Judge, and HOFFMAN*, Senior District Judge.

William L. Auten (Blakeney, Alexander & Machen on brief) for Appellant; Michael A. Sheely (Joyce M. Brooks, Sheely and Brooks on brief) for Appellees.

*Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

This class action was instituted by Elizabeth Evans, a non-academic employee at Central Piedmont Community College. She charged that certain employment practices of the school violated Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. §2000e-2. Later, Alena Stevenson and Jayne Eddens were joined as named plaintiffs. All three women alleged that, in various ways, the school had discriminated against each of them on the basis of sex. After a bench trial, the district court upheld the claims of the three named plaintiffs as well as the claims of two class members. The court ordered that a special master be appointed to assess the claims of other class members.

On appeal, the defendant contests the certification of the class as well as the specific findings on sex discrimination. We hold that class certification was improper and that the evidence adduced at trial did not warrant a finding that Central Piedmont violated Title VII.

I

The district court's rulings on the Title VII claims were based on the disparate treatment theory.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). No substantial legal issues are presented on this appeal. The only question is whether the facts warrant a finding of sex discrimination. The standards are well known. See Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, supra. The burden is on the plaintiffs to prove that the defendant has violated Title VII. This may be accomplished through presentation of evidence that warrants an inference of sex discrimination. McDonnell Douglas, supra, 411 U.S. at 800-06. Once the plaintiffs have established a "prima facie" case, the burden of production shifts to the defendant to articulate a legitimate reason for the apparently discriminatory action. Keene State, supra. Once a legitimate reason is articulated, the burden shifts back to the plaintiffs, who must prove that the proffered reason is pretextual. Furnco Construction, supra. The several instances of sex discrimination charged in this case either fail to establish a prima facie case, or, having done so, are sufficiently rebutted by defendant's articulation of legitimate reasons for its behavior. There is no evidence of pretext.

1. Elizabeth Evans

Evans, a high school graduate with two years of business college, was hired by Central Piedmont as a clerical employee in 1968. In 1969 she assumed responsiblity for operating the admissions office. Her duties were entirely clerical since Central Piedmont has an open admissions policy. These duties included starting and maintaining student files, filing student records, scheduling appointments for tests and counseling and handling transcripts. She testified that on occasion she did counsel students on course selection; however, the school had a professional staff of counselors charged with that function. The woman who preceded Evans in the admissions office was a professional counselor. Evans was apparently expected to relieve this woman of the clerical aspects of the admissions office work. Evans was at times spoken of as Central Piedmont's Admissions Officer, and she did have a number of part-time workers and work-study students helping her in the office. She was not considered a supervisor, however, since the person directly responsible for these employees was her immediate supervisor.

Evans complained to her supervisor that she was

receiving only clerical pay while performing an administrative task. She also complained that she was inundated with work while other clerical employees in the office had little or no work. She filed a complaint with the EEOC. The school relieved Evans of a number of her duties (all clerical and all assumed by other clerical employees). Her pay was not reduced.

There was no evidence that a male performing this job had been or would have been paid more or treated more favorably. Thus, even assuming Evans was entitled to better treatment, there is not even a suggestion of sex discrimination. The evidence presented with respect to Elizabeth Evans is inadequate to establish any inference of discrimination.

2. Alena Stevenson

Stevenson complains that she was discriminated against when she was not promoted to Financial Aid Director in 1976. She is a high school graduate with two years of college.

Stevenson was employed in the Financial Aid Office as an assistant. She was offered the position of Financial Aid Director; however, she turned it down since she did not wish to assume a responsibility which she believed would be inadequately compensated. She

agreed to serve as Acting Director until a replacement could be found. She was paid additional salary for taking on this task and apparently did a good job.

After the new Director was hired, Stevenson continued performing many of the same duties she had performed while Acting Director. Over a several month period, a series of negotiations were held between Stevenson and responsible administrators. She wanted either less duty or more pay, with a preference for the former. Finally, a compromise was reached. Her duties were cut back, and her pay was increased slightly. Stevenson was classified as a clerical, but she was paid more than other clericals.

When the new Director announced his intention to quit, Stevenson decided, with her experience, that she would now like the job. However, a male was hired instead. By that time a job description had developed. It required "3 years' experience and Masters Degree or preferred experience." The man hired had five years' experience managing a financial aid program, a Masters Degree and experience in computerizing financial aid programs. This latter factor was significant, since Central Piedmont hoped to computerize its financial aid program.

The district court found, "The defendant Central Piedmont discriminated against plaintiff Alena Stevenson on the basis of her sex by not promoting her or paying her a salary commensurate with her job responsibilities."

We see no basis for this conclusion. The adequacy of Stevenson's compensation was the subject of good faith negotiations by both parties. There is no suggestion in the evidence that the pay rate or job description was related in any manner to the fact that she was a woman. With respect to the school's decision not to promote Stevenson and to hire a man for the position, we may assume that this establishes a prima facie case of sex discrimination. Even so, the defendant has articulated a legitimate reason for the hiring decision by demonstrating the superior qualifications of the individual hired.[1] There has been no showing that these reasons were pretextual.

3. Jayne Eddens

Eddens, a college graduate, was hired to work in

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1. There was also evidence that Stevenson was becoming increasingly unable to cope with her existing job due to severe depression brought on by physiological factors.

the Registration Center. She was responsible for overseeing registration each quarter. She claimed to be a supervisor who was paid as a clerical. Her initial salary was $500 a month, but that was increased to $625 after she filed an EEOC suit. Defendant's evidence suggests that the raise was delayed for six months because the department in which Eddens worked was in the process of reorganization. A job description was being developed for her position. Eddens' immediate predecessor was a woman who was paid $617 a month in 1973. Her predecessor was a male who was paid $607 a month in 1971. There was evidence that the male predecessor had more duties than either Eddens or her predecesssor. Moreover, Eddens was given the position over another male who had applied and who was at that time working in the Registration Center.

This evidence is simply insufficient to establish a violation of Title VII. There is nothing in the record to indicate that had the male been hired instead of Eddens he would have been treated more favorably.

II

These are highly individualized claims. The district court attempted to find a common thread among

them in a conclusion that a concept of "process management" was used as a device to discriminate against women who should have been classified and compensated as supervisors. Indeed, there was passing reference to "process management" by individuals not classified as supervisors but who directed the work to be done by part-time employees or work-study students. There were more women in clerical positions than men, but the witness who referred to the process management positions stated that, while he had not attempted an actual count, he thought there were more men than women in such positions. If the court thought that such positions should be reclassified as supervisory, there was no disparate impact upon women since more men than women would have been advanced in responsibility and compensation. Moreover, in the record only Evans was said to have been a process manager. The other two named plaintiffs may or may or may not have been, but clearly the two class members whom the district court found to have been the victims of discrimination because of their sex were not process managers. These are claims of discrimination because of sex, but the requisite commonality among them for class certification is simply lacking. The separate factual problems presented by these

individual claims clearly predominate, and certification of the class was improper. Federal Rules of Civil Procedure, Rule 23; 7A C. Wright & A. Miller, Federal Practice & Procedure §1778, at 55-57.

Since we have found that certification of the class was improper, we do not adjudicate the claims of the two purported class members found by the district court to have been victims of discrimination. We have found in their claims, however, nothing suggestive of the existence of a potential certifiable class or which suggests the presence of discrimination against women in employment. This was a new institution. New departments were being organized and reorganized, and such things as job descriptions were in the course of preparation. Clearly there was some confusion in administration, but the record simply fails to support a finding of disparate treatment of women because of their sex.

REVERSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1613

Elizabeth Evans, Alena M. Stevenson and Jayne C. Eddens, individually and on behalf of all others similarly situated,

Appellees,

versus

Central Piedmont Community College,

Appellant,

and

Richard Hagemeyer, individually and as President of Central Piedmont Community College; and Melvin Gay, individually, and as Vice President of Student Services of Central Piedmont Community College,

Defendants.

O R D E R

Upon consideration of the petition for rehearing in this case, and with the concurrence of Judge Widener and Judge Hoffman,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

August 28, 1980.

/s/Clement F. Haynsworth
Chief Judge, Fourth Circuit

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

U. S. Code Title 28

§2000e-2. Unlawful Employment Practices--Employer Practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)

Supreme Court, U.S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELIZABETH EVANS, ALENA M. STEVENSON, AND JAYNE C. EDDENS, *etc.*,

Petitioners,

VS.

CENTRAL PIEDMONT COMMUNITY COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR CENTRAL PIEDMONT COMMUNITY COLLEGE IN OPPOSITION TO PETITION

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LISTING OF ALL THE PARTIES IN THE CASE

In addition to the parties above-named in the caption of this case, Richard Hagemeyer, individually and as President of Central Piedmont Community College, and Melvin Gay, individually and as Vice President of Student Services of Central Piedmont Community College, were joined as defendants (See App. to Petition, p. 40). The District Court, however, dismissed all claims against them; such dismissal was not appealed; and they did not appear in the Court of Appeals.

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I.

COUNTERSTATEMENT OF THE CASE

In this nonjury case, the United States District Court for the Western District of North Carolina adopted, practically verbatim, the Title VII plaintiffs'[1] proposed findings of fact and conclusions of law, which culminated in conclusions that their employer, Central Piedmont Community College,[2] had discriminated against them and a class of its female employees because of their sex. These ultimate conclusions were premised upon the Employees' nonspecific, conclusionary proposed findings to the effect that they had been

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[1] Elizabeth Evans, Alena M. Stevenson, and Jayne C. Eddens, Petitioners in this case, hereinafter the "Employees".

[2] The Respondent, hereinafter the "College".

subjected to disparate treatment in the terms and conditions of their employment and that the College's application of a "process management" concept was "a pattern and practice of discrimination against women". Upon such findings and conclusions, the District Court granted injunctive relief, attorneys' fees and costs to the Employees and a certified class and mandated backpay proceedings.

On appeal to the United States Court of Appeals for the Fourth Circuit, the College contended: (1) That the evidence either failed to support findings from which employment discrimination might be inferred or failed even to suggest that legitimate, non-discriminatory reasons articulated for management decisions were, in fact, pretextual; and (2) That there was no evidence of any pattern or practice of subjecting female employees to disparate treatment nor any proof that any employment

policy or practice disproportionately affected female employees. Upon these contentions, the College submitted the ultimate issue on its appeal: Were the trial court's findings and resulting conclusions unwarranted, in that they "were unsupported by substantial evidence or were flatly contradicted by admitted and uncontested facts"?

Upon this ultimate issue, the Court of Appeals agreed with the College's contentions, holding "that the evidence adduced at trial did not warrant a finding that Central Piedmont violated Title VII".

> "No substantial legal issues are presented on this appeal. The only question is whether the facts warrant a finding of sex discrimination. The standards are well known. See Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas [Corp. v. Green, 411 U.S. 792 (1973)]. The burden is on the [Employees] to prove that the [College] has violated Title VII. This may be accomplished through presentation of evidence that warrants an inference of sex discrimination.

> . . . The several instances of sex discrimination charged in this case either failed to establish a prima facie case, or, having done so, are sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior. There is no evidence of pretext" (App. to Petition, pp. 41-42).
>
> . . .
>
> "If the court thought that [process management] positions should be reclassified as supervisory, there was no disparate impact upon women since more men than women would have been advanced in responsibility and compensation" (App. to Petition, p. 48).

Accordingly, the Court of Appeals "Reversed" the District Court's judgment and order.

II.

SUMMARY OF ARGUMENT

The Court of Appeals' decision applied settled authority, as clearly enounced by this Court, to the particular facts of this case. The facts included those proved by the College's unrebutted evidence and those established by the

Employees' own admissions, although the Petition resolutely ignores them.

No conflict with decisions of other courts exists upon these facts; no "significant question of federal law" is presented by the Petition; and there otherwise are no "special and important" reasons advising an exercise of this Court's discretion to review this case. Precisely to the contrary, as the Circuit Court affirmatively stated, "no substantial legal issues" have been presented or decided.

Nevertheless, the Petition endeavors to create an illusion of significant legal issues by mischaracterizing both the Circuit Court's decision and the evidence which it reviewed. Thus, the Petition, in Paragraphs 4 and 5 of the "Questions Presented" and in subsequent arguments, suggests that experienced trial and appellate judges, because they did not explicitly refer to Rule 52(a) of the Federal Rules of

Civil Procedure, were not mindful of the well-known "clearly-erroneous" standard for review of a trial court's subsidiary fact-findings. As will be argued below, the Court of Appeals did not even approach the outer limits of its jurisdiction and authority, consistent with Rule 52(a), to set aside erroneous conclusionary findings. And the Circuit Court certainly was not bound to disregard either the Employees' own admissions or unrebutted evidence presented by the College.

Furthermore, the Petition presumes that a "pattern and practice" of sex discrimination was proved, regardless of fatal deficiencies in the Employees' evidence and regardless of uncontradicted evidence that there was no such pattern or practice.

As specified above, the District Court's only findings or conclusions relative to any pattern or practice of sex discrimination resulted from the College's

application of a "process management" concept. There was absolutely no evidence, however, that the process management concept was applied to a greater proportion, or even a greater number, of female employees than male employees. In fact, there was uncontradicted testimony that the concept was applied equally to male and female employees — but to a greater number of male employees — in various job classifications in addition to the clerical classification. As the Court of Appeals observed, "in the record only Evans was said to have been a process manager". And uncontradicted evidence established that the concept applied equally to a male clerical employee whose job was virtually identical to Evans' job.

The District Court did not rely, and could not have relied, upon statistical evidence of a pattern or practice of sex discrimination because the Employees'

statistical evidence was admittedly incomplete and unreliable. The College's unrebutted statistical evidence, on the other hand, tended to prove that the College's female employees were afforded equal employment opportunities and that the percentages of female employees in the College's various job categories were equal to or greater than comparable percentages of females available in the local workforce.

Finally, the Petition utterly mischaracterizes the Circuit Court's rulings in regard to proof of disparate treatment. The Court of Appeals ruled only that the Employees must have presented "evidence that warrants an inference of sex discrimination", citing McDonnell Douglas v. Green, supra (App. to Petition, p. 42 [emphasis added]). Where the evidence did permit an inference of sex discrimination, however, the Circuit Court

found that such evidence was "sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior" (App. to Petition, p. 42). Indeed, the District Court did not find or conclude that the College's reasons were pretextual.

It is respectfully submitted that the Petition's assertions regarding allegedly improper review of subsidiary fact-findings are frivolous and do not present any grounds for a decision by this Court. Nevertheless, the College will incorporate in its Argument a summarization of the deficiencies in the Employees' evidence.

III.

ARGUMENT

A. The Court of Appeals Applied A Narrow Review Standard

In its holding "that the evidence adduced at trial did not warrant a finding that Central Piedmont violated Title VII" (App. to Petition, p. 41), the Circuit

Court set aside the ultimate "findings" in this employment discrimination case. Those ultimate "findings" necessarily incorporated rulings upon mixed questions of law and fact which, at a minimum, are not under the full protection of the "clearly erroneous" standard (See Shultz v. Wheaton Glass Co., 421 F. 259, 267 (3rd Cir. 1970), cert. den., 398 U.S. 905 (1970); and Official Creditors' Committee of Fox Markets, Inc. v. Ely, 337 F. 2d 461, 467 (9th Cir. 1964), cert. den., 380 U.S. 978 (1965)).

In any event, the Court of Appeals' rulings in this case were well within the clearly erroneous standard. It is reiterated that the issue presented on appeal was whether the findings and conclusions "were unsupported by substantial evidence or were flatly contradicted by admitted and uncontested facts". It is settled law that "if a finding is not

supported by substantial evidence, it will be found to be clearly erroneous" (See Wright & Miller, Federal Practice and Procedure: Civil §2585, p. 735 (1971), and cases cited therein). Additionally, and exactly contrary to the Petition's assertions, this Court in a leading case has held that a finding may be "clearly erroneous" upon review of "the entire evidence", even though "there is evidence to support it". United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948).

Moreover, the Circuit Court explicitly and carefully confined its review of this case to the "well known standards" enounced by this Court in respect of "the order and allocation of proof" in an employment discrimination case (See App. to Petition, p. 42, and cases cited therein). The Court below required only that the findings and conclusions be supported by "evidence that warrants an inference of sex

discrimination" (App. to Petition, p. 42). Admissions and glaring deficiencies in the Employees' evidence, however, together with uncontradicted evidence presented by the College, resulted in conclusions that the Employees' proofs "either fail[ed] to establish a prima facie case" or that such proofs were "sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior" (App. to Petition, p. 42).

It is respectfully contended that these rulings do not suggest any ground or reason for review by this Court.

B. There Was Neither Evidence of a Pattern or Practice of Discrimination Nor Evidence of a Policy or Practice Having a Disparate Impact Upon Female Employees

The only findings or conclusions that the College had engaged in a pattern or practice of employment discrimination because of sex were premised upon a College officer's testimony that certain employees

were considered to be nonsupervisory "process managers". Process managers instructed other employees in the performance of their work and made recommendations concerning hiring, salary, work schedules, discipline and discharge. These recommendations were made "to the supervisor of the worker".

In this testimony, the College officer identified by name several male employees who were considered to be process managers, in that they directed other employees' work but were not considered to be supervisors. The "process management" concept, differentiating between supervision and the direction of work by nonsupervisors, was shown by uncontradicted evidence to apply both to male and female employees, although the witness was able to identify more males.

Among the plaintiffs, "only Evans was said to have been a process manager"

(App. to Petition, p. 48). And uncontradicted evidence established that a nonsupervisory male employee, whose job duties were virtually identical to Evans', was also classified as a clerical employee but was paid less than Evans.

Additionally, well over one hundred of the College's full-time nonsupervisory employees utilized and directed part-time employees. Moreover, the process management concept was applied to employees in various job classifications, including maintenance employees, instructional employees, clerical employees and various others.

Ignoring the foregoing evidence, the Petition presents arguments relative to "an employer's burden in a class action pattern and practice discrimination case" (See Questions Presented, par. 1). This purported issue, of course, begs the question of whether any evidence established a

pattern or practice of discrimination and presumes that there was such evidence. The pattern and practice findings and conclusions and the Petition's arguments, however, are premised upon two monumental assumptions unsupported by any record evidence and, in fact, contradicted by the unrebutted evidence summarized above. The Petition's first assumption is that the process management concept was applied only to clerical employees; the second assumption is that the concept was applied to a higher percentage of female employees than male employees. There was absolutely no evidence supporting either assumption.

There was no evidence that the concept was applied only to clerical employees. There also was no evidence that the concept was applied to fewer than one hundred percent of the College's male clerical employees. Lastly, there was no evidence that the concept was applied to a

greater percentage, or even a greater number, of female employees than male employees. Precisely to the contrary, there was unrebutted evidence that the concept was applied to employees in various job classifications in addition to the clerical classification; that the concept was applied to the only male clerical employee mentioned in the record; and that the concept was applied to a greater number of male employees than female employees.

It is emphasized that there were no findings or conclusions founded upon any statistical evidence of a pattern or practice of sex discrimination. It has been shown that there was no disparate-impact proof. The Employees' individual claims, as shown below, also supplied no proof of any discriminatory pattern or practice.

C. The Court of Appeals Correctly Applied This Court's Decisions Defining the Burden and Allocation of Proof in Title VII Cases

The Circuit Court held that a trial court's findings and conclusions of employment discrimination need only be supported by "evidence that warrants an inference of sex discrimination", citing McDonnell Douglas v. Green, supra (App. to Petition, p. 42 [emphasis added]). McDonnell Douglas, of course, specified the elements of a prima facie employment discrimination case in the context of a refusal-to-hire. In the contexts of various other employment decisions, a prima facie case requires proof of some fact or circumstance from which discrimination could be inferred. In this case, the Court of Appeals reviewed the record for evidence of any such facts or circumstances.

To the extent that the evidence did permit an inference of sex discrimination,

the Court below also reviewed the College's uncontradicted explanations for its actions and concluded that they "sufficiently rebutted" the Employees' evidence (App. to Petition, p. 42). Such review certainly was proper under this Court's decisions.

The Court of Appeals also searched the record for evidence that the College's reasons for its actions were pretextual and concluded that there was no such evidence. This search could only have benefited the Employees, because the District Court had entered no findings or conclusions that the College's explanations were pretextual.

The decision in this case is decidedly not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in Burdine v. Texas Dept. of Community Affairs, 608 F. 2d 563 (5th Cir. 1979). Here, the Court of Appeals expressly ruled upon the "sufficiency" of the College's explanations for its actions.

Additionally, where the decision herein "assumed" that a "prima facie case of sex discrimination" may have been proved, it also concluded that the College sufficiently had explained its "hiring decision by demonstrating the superior qualifications of the individual hired" (App. to Petition, p. 46).

D. Uncontradicted Evidence and the Employees' Admissions Precluded Any Inference of Discrimination Because of Sex

The following summarizations of admissions and deficiencies in the Employees' evidence and of the College's unrebutted evidence demonstrate the correctness of the decision below.

1. Elizabeth Evans

Evans claimed that she held a "responsible position" but "was not paid accordingly". There was absolutely no evidence that any similarly-situated male employee, at any time or for any reason,

was treated differently than Evans. To the contrary, the evidence established that a male whose duties were virtually identical to Evans' was classified the same as, but paid less than, Evans.

Evans admitted that all of her job functions were clerical, although she stated that she made decisions and helped the College's professional counselors based on information given to her by them. She also admitted that no male employee had ever been preferred over her in the Admissions Office; that she was unqualified for a counselor's job; and that she had never indicated interest in any other job at the College and was not interested in a transfer.

After Evans complained that she was overworked and that other clerical personnel were underutilized, routine clerical functions were transferred from Evans to such other clerical employees. Evans

claimed that this transfer was in retaliation for her discrimination charge. Unrebutted evidence established, however, that a principal element of this 1976 transfer of clerical functions actually had been decided upon in 1975, long before Evans filed her charge. Furthermore, uncontradicted evidence showed that legitimate, non-discriminatory reasons dictated such transfer. Neither Evans' pay, nor any of her benefits, nor her status were affected by the transfer of work.

2. Alena M. Stevenson

Stevenson testified that her only claim of sex discrimination was that the College hired a male, instead of promoting her, in 1976. There was no evidence that any male whose responsibilities were similar to Stevenson's was classified differently or received higher pay. Unrebutted evidence established that Stevenson

received "paraprofessional" pay rather than clerical pay.

The bulk of the evidence pertaining to Stevenson's employment related to a process of negotiating, proposing and counterproposing appropriate job classifications and salaries. And Stevenson ultimately admitted that this process did not involve discrimination against her. Late in 1975, before Stevenson filed her charge of employment discrimination, College officials and Stevenson agreed upon, drafted and solemnly executed a job description for her, which was accompanied by a negotiated salary increase.

As the Court of Appeals concluded, the College's hiring of a male, instead of promoting Stevenson, was based upon relative qualifications. The College articulated definite, substantial, legitimate, and nondiscriminatory reasons for the selection.

There was no evidence that the College's reasons were pretextual.

3. Jayne C. Eddens

Eddens admitted that her entire claim was premised upon a comparison of a new position, into which she was promoted in 1976, with a position that a male had occupied in 1971. Eddens was promoted to her position instead of a male employee after she had been employed for less than a year.

Although Eddens conceded that she had no personal knowledge of the male employee's 1971 employment duties, she admitted that a letter description of his duties, which she had offered into evidence, described two specific job functions that Eddens did not perform. She also admitted it was "possible" that the male employee's job subsequently had been divided into three different jobs.

The College's unrebutted evidence established that the male employee's job had encompassed many more areas of responsibility than were assigned to Eddens in 1976.

4. Sylvia Guion

Guion, who was classified as a "lab instructor" in the College's telecourse center, claimed that she should have been paid as an instructor. She operated the equipment which played video tapes of professional instructors' lectures. These tapes furnished directions and guided the students through a workbook. The televised programs provided remedial or developmental instruction in English, mathematics and reading. Although Guion assisted the students with problems they encountered, her duties were not different from those of other lab personnel who set up their labs and assisted students with problems. From the inception of her employment in the telecourse center, Guion had been told that

students who required additional help should be referred to the professional instructors of the remedial courses. Additionally, an open classroom was staffed by such instructors to assist students.

Lengthy testimony detailed legitimate, non-discriminatory reasons for Guion's classification as a "lab instructor". No employee in any of the College's several laboratories was paid as an instructor. There was absolutely no record evidence that any similarly-situated male employee, at any time or for any reason, was treated differently than Guion.

Guion also testified that she had asked for, but had been denied, supervisory pay, specifying that she had "eight student aides working for me". As shown above, significant numbers of the College's male and female nonsupervisory employees directed the work of part-time employees. There

was, however, no evidentiary indication of disparate impact upon female employees.

5. Margaret Laing

Laing claimed that she discriminatorily had been denied a full-time job in the College's campus television project. She admitted, however, that her male "assistant" quit because he could not get a full-time job. Laing sought to compare her treatment with that afforded a male employee who, in effect, occupied two part-time jobs at the College. That male employee was paid a substantially lower hourly rate than the rate the College paid Laing.

Laing subsequently transferred to the College's Media Services Department. She claimed that, in this department, she was paid less than a male employee who performed identical work. Unrebutted evidence, however, established that the difference had resulted from the schedule that Laing

had chosen for herself. Another female employee in the same job formerly had been paid on precisely the same basis as the male employee. Moreover, during the male's employment, four female employees in the same Division were paid on the same basis as he was paid.

In 1978, Laing applied for a full-time script developer job which the College, at the time, planned to fill. The College's unrebutted evidence established that the position was not filled, because a new supervisor was hired and decided not to employ any additional full-time script developers. At the time, there were three full-time employees in script developer positions, and two of the three were females.

IV.

CONCLUSION

Upon all of the foregoing, Central Piedmont Community College earnestly contends

that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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